Hussaina Rani i/k Naina Mohamed (suing as widow of Naina Mohamed, deceased) v Ahmad Nadzri Kamaruddin & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-531-95
GOPAL SRI RAM, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
22 MAY 1996

Civil Procedure *— Appeal — Facts, finding of — Appellate court slow to interfere with findings of lower court — Accident case*

The deceased was knocked down by a bus driven by the first respondent. The only evidence from the appellant, who was the sole witness, apart from describing the scene of the tragedy, could not tell how the accident occurred. The first respondent testified that he saw two people running fast, one in front of the other, from the right hand side of the carriageway. The person in front crossed the divider into the first respondent's path, whereupon he braked, thereby reducing his speed. Thereafter, he had accelerated and when the bus was passing the opening at the divider, the second person had jumped over the fence on the divider and was knocked down by the bus. The first respondent's police report supported his testimony. Counsel for the appellant suggested through cross-examination that after missing the first person who crossed, the first respondent had swerved his bus to the right and had run into the deceased who was standing on the divider. There was no evidence to that effect. In these circumstances, the trial judge had dismissed the appellant's claim. The appellant appealed.

Held, dismissing the appeal:

An appellate tribunal should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion. In this appeal, the appellant in the court below could not even tell how the accident took place and no police evidence was called. The respondent, on the other hand, had given evidence similar to the contents of his police report which did not at all indicate any negligence on his part. Therefore, the court could not say that the trial judge had acted in error. In consequence, the appeal was dismissed with costs and the order of the learned trial judge was affirmed (see pp 536I and 537A–C); *Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291 and *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 followed.

[Bahasa Malaysia summary

Si mati dilanggar oleh sebuah bas yang dipandu oleh penentang pertama. Satu-satunya keterangan daripada perayu, yang merupakan saksi tunggal, selain daripada menerangkan tempat tragedi, tidak dapat memberitahu bagaimana kemalangan berlaku. Penentang pertama memberi keterangan bahawa dia nampak dua orang berlari

dengan pantas, seorang di depan seorang lagi, dari sebelah kanan jalan raya. Orang di hadapan melintasi pembahagi jalan ke jalan penentang, yang mana penentang pertama telah membrek, lalu mengurangkan kelajuannya. Selepas itu, dia telah memecut dan apabila bas melalui pembukaan di pembahagi, orang kedua telah melompat pagar di pembahagi dan dilanggar oleh bas tersebut. Laporan polis penentang pertama menyokong testimoninya. Peguam perayu mencadangkan melalui pemeriksaan balas bahawa selepas mengelak orang pertama yang memintas, penentang pertama telah membelok basnya ke kanan dan telah melanggar si mati yang berdiri di pembahagi. Tiada keterangan yang membuktikan ini telah berlaku. Dalam keadaan ini, hakim perbicaraan menolak tuntutan perayu. Perayu membuat rayuan.

Diputuskan, menolak rayuan:

Sesebuah tribunal rayuan seharusnya berwaspada dalam mengganggu pendapat fakta mahkamah perbicaraan yang telah memerhatikan kelakuan dan mendengar saksi-saksi sebelum mencapai kesimpulannya. Dalam rayuan ini, perayu di mahkamah bawah tidak dapat memberitahu bagaimana kemalangan berlaku dan tiada keterangan polis telah dipanggil. Sebaliknya, penentang telah memberikan keterangan yang serupa dengan kandungan laporan polisnya yang langsung tidak menunjukkan apa-apa kecuaian pada pihaknya. Oleh yang demikian, mahkamah tidak boleh mengatakan hakim perbicaraan telah bertindak dalam kesilapan. Akibatnya, rayuan ditolak dengan kos dan perintah hakim perbicaraan yang arif disahkan (lihat ms 536I dan 537A–C); *Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291 dan *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 diikut.]

Notes

For cases on findings of fact, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 366–435.

Cases referred to

Neo Chan Eng v Koh Yong Hoe [1960] MLJ 291 (folld)
Siti Aisha bte Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124 (folld)

Appeal from: Suit No S3–23–43–91 (High Court, Kuala Lumpur)

R Arunachalam (*Arun & Co*) for the appellant.
S Suresh (*RK Nathan & Co*) for the respondent.

Cur Adv Vult

Abdul Malek Ahmad JCA (delivering the judgment of the court): Just after midnight on 11 September 1990, the first respondent was driving the second respondent's bus from Happy Garden towards the city when, at the 4½ milestone Jalan Klang Lama, he had knocked into a pedestrian crossing the road ('the deceased').

The only evidence from the appellant, who is the widow of the deceased, was that the scene of the accident was a dual carriageway with a divider along the middle with a fence about three or four feet high with an opening through which pedestrians could pass through, quite often used since there was no sign to forbid them to do so. There were shops and a market on the left side of the road as one faces the city. The appellant was the sole witness but, apart from describing the scene of the tragedy, could not tell how the accident occurred.

The first respondent testified that he was driving in the inner lane between 40 to 50km per hour because there were vehicles parked in the outer lane. He saw two people running fast, one in front of the other, from the right hand side of the carriageway. He did not expect them, who appeared to be quarrelling, to cross the divider into his path but the person in front did so when the bus was 30ft away whereupon he braked thereby reducing his speed to 25km per hour.

Thereafter, he had accelerated and when the bus was passing the opening at the divider, the second person had jumped over the fence on the divider and was knocked down by the bus. In cross-examination, he clarified that he did not see the person jump over the fence, but was certain that the person had fallen in front of the bus.

Learned counsel for the appellant suggested through cross-examination that after missing the first person who crossed, the first respondent had swerved his bus to the right and had run into the deceased who was standing on the divider. It must be emphasized here that there was no evidence to that effect and the first respondent's police report had actually supported his testimony.

In these circumstances, the learned trial judge had dismissed the appellant's claim. Despite that, he had in his judgment discussed the quantum of damages the appellant should get if he was said to have erred on appeal, but we see no necessity to deliberate on the quantum because we were in full agreement with him on the liability point and in fact, after hearing learned counsel for the appellant, did not require a reply from learned counsel for the respondent.

In *Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291, it was held:

> The onus of proving negligence on the part of the defendant is on the plaintiff. Where he fails to discharge it, either by his own evidence or by cross-examination of the defendant or by admission made by the defendant, his claim fails.

In *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124, the Federal Court ruled that:

> The question for determination by the learned President in this case was essentially one of fact. The finding of the trial court should not have been disturbed as there was no valid reason to show that the trial judge had not taken advantage of his having seen and heard the witnesses.

Apart from these two cases, there are numerous other authorities, too many to mention, which categorically state that an appellate tribunal

should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion. In this particular appeal, the appellant in the court below could not even tell how the accident took place and no police evidence was called. The respondent, on the other hand, had given evidence similar to the contents of his police report which did not at all indicate any negligence on his part. We could not, therefore, say that the trial judge had acted in error here.

In consequence, we had dismissed the appeal with costs, affirmed the order of the learned trial judge and ordered that the deposit is to go to the respondent to account of their taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar